Supreme Court, U.S.
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In the

Supreme Court of the United States

UNIFUND CCR PARTNERS, INC.,

Petitioner,

v.

FRANK MAGRIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does a consumer states a valid claim for relief under the Fair Debt Collection Practices Act when he alleges that a debt collector has made false representations as to the legal status of a debt in connection with the sale, transfer or assignment of a debt to another debt collector, with the knowledge that the purchaser, transferee or assignee intends to initiate or continue attempts to collect the debt?

PARTIES TO THE PROCEEDING

The parties are:

Petitioner: Unifund CCR Partners ("Unifund"), a business located in Cincinnati, Ohio.

Respondent: Frank Magrin ("Magrin"), an individual.

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IN THE
SUPREME COURT OF THE UNITED STATES

UNIFUND CCR PARTNERS, INC.
Petitioner,

versus

FRANK MAGRIN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

UNIFUND CCR PARTNERS, INC., by undersigned counsel, under appropriate rules of this Court, requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

Respondent brought an action in the United States District Court for the District of Nevada ("District Court") against Petitioner alleging that the Petitioner violated the Fair Debt Collection Practices Act (the "FDCPA") which is the legislation controlling the outcome of this litigation. After filing two state court collection actions against the Respondent and dismissing those actions with prejudice, Petitioner sold the accounts to The Credit Store as part of a portfolio of accounts. Both the District Court and the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit Court of Appeals") decisions are unreported.

The District Court concluded that Respondent's claims against Petitioner failed because the sale of

accounts by Petitioner to The Credit Store, as alleged by Respondent, was not an act to collect a debt encompassed by the FDCPA.

Respondent appealed the District Court's Decision to the Ninth Circuit Court of Appeals which reversed the Decision, stating that "a consumer states a valid claim for relief under the FDCPA when he alleges that a debt collector has made false representations as to the legal status of a debt in connection with the sale, transfer or assignment of a debt to another debt collector, with the knowledge that the purchaser, transferee or assignee intends to initiate or continue attempts to collect the debt." This statement of law is clearly incorrect, prejudices Petitioner and other members of its industry, adversely impacts the administration of justice, was not supported by any statement of authority and must be reversed by this Court.

JURISDICTION

The Decision of the Ninth Circuit Court of Appeals was entered on December 10, 2002.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This Court denied Petitioner's motion for extension of time to submit this Petition.

RELEVANT STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1692a(6) defines debt collector "as any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts or who

regularly collects or attempts to collect, directly or indirectly, debts owed, due or asserted to be owed or due to another."

15 U.S.C. §1692c states, in relevant part, "Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt..." (emphasis added.)

15 U.S.C. §1692d states, in relevant part, "A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." (emphasis added.)

15 U.S.C. § 1692e states, in relevant part, "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. (emphasis added.)

15 U.S.C. § 1692f, states, in relevant part, "A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. (emphasis added.)

STATEMENT OF THE CASE

A. General Background

Petitioner is a business entity located in Cincinnati, Ohio, the principal business of which is the collection of debts. Petitioner's business includes, but is not limited to, the collection or attempted collection of debts subject to the FDCPA and may be a "debt

collector" as defined by 15 U.S.C. §1692a(6) in certain of its actions.

Petitioner acquired two delinquent accounts owed by the Respondent. Petitioner filed a state court collection action against Respondent in 1997 for credit charges allegedly made by Respondent under a SILO charge account. This action was dismissed with prejudice. Also in 1997, Petitioner filed a second state court collection action against Respondent to recover credit charges allegedly made by Respondent under a Montgomery Ward charge account. This action was also dismissed with prejudice. Both actions were dismissed more than one year before the filing of Respondent's Complaint in this proceeding.

Subsequent to the dismissal of the state court actions referenced above, The Credit Store acquired Respondent's accounts from Petitioner. The Credit Store mailed letters to the Respondent in connection with both the SILO account and the Montgomery Ward account. After the sale of these accounts to The Credit Store, Petitioner took no further actions which would be typical of a debt collector in the collection of a debt, including but not limited to, (i) attempting to collect any money from Respondent; (ii) asking or instructing Respondent to contact it; (iii) conducting any follow-up collection services and/or (iv) having any further relationship or contact with Respondent. Moreover, the sale proceeds received by Petitioner for the sale of the accounts was not dependant upon the collectability of the accounts by The Credit Store.

In response to The Credit Store's letters, Respondent filed his original Complaint on June 14, 2000, solely against The Credit Store, and alleged that its actions violated the FDCPA. On August 17, 2000, the

Plaintiff filed his Amended Complaint, which merely added Petitioner as a party-defendant. No specific factual allegations of possible improper collection activity were alleged by the Respondent against Petitioner in the Amended Complaint. The only two causes of action set forth in the Amended Complaint were (a) for alleged violations of the FDCPA and (b) for alleged violations of the state-law doctrine of Invasion of Privacy.

Subsequent to the filing of the Amended Complaint, The Credit Store was dismissed, with prejudice, by the Respondent as a party-defendant to the action.

B. The Procedural History

On September 6, 2000, Petitioner filed a Motion to Dismiss Respondent's claims for failure to state a claim upon which relief may be granted. The Motion was based upon the undisputed fact that Petitioner's interactions with the Respondent had terminated well before the sale of the accounts and more than one year before the filing of the Complaint. On October 24, 2000, Respondent filed a Memorandum in Opposition to Petitioner's Motion to Dismiss. The Memorandum in Opposition focused upon the sale of accounts as being the act which may have imposed liability upon the Petitioner under the FDCPA. On November 6, 2000, Petitioner filed a Reply Memorandum in Support of the Motion to Dismiss. In the Reply Memorandum, Petitioner argued that a sale of accounts is not an act done in connection with the collection of a debt and is not, therefore, encompassed by the FDCPA.

The District Court granted the Motion to Dismiss by an Order dated December 15, 2000. The Order dismissed all claims against Petitioner with prejudice.

Respondent appealed the District Court's decision and assigned as the sole error the District Court's dismissal of his claim against Petitioner for violations of the FDCPA. The Ninth Circuit Court of Appeals reversed the District Court's decision on December 10, 2002.

REASONS FOR GRANTING WRIT

A. THE PETITION SHOULD BE GRANTED AS THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE PLAIN MEANING OF THE FAIR DEBT COLLECTION PRACTICES ACT

The FDCPA was designed to promote ethical business practices by debt collectors. S. Rep. No. 382, 95th Cong., 1st Sess. 1, reprinted in 1977 U.S.C.C.A.N. 1695, 1696 and Appx. B (Clearinghouse No. 31,059D) (hereinafter "S. Rep. No. 382"). The FDCPA establishes general standards of proscribed conduct, defines and restricts abusive collection acts, and provides specific rights for consumers. In order to constitute a violation of the FDCPA, the complained of activity must, at the very least, be conducted by (a) a debt collector and (b) in connection with the collection of consumer debt. See e.g., 15 U.S.C. §§ 1692e and 1692f. The legal standard established by the Ninth Circuit in its Decision goes well beyond legislative intent as it seeks to impose liability for mere business transactions that are not done in furtherance of the collection of a debt nor which involve interactions with the consumer. The Ninth Circuit did

not cite or rely upon any direct authority for its Decision on this issue.

The plain meaning of the statute should first be determined in order to interpret a statute. The plain meaning of a statute can be determined "by looking at the particular language at issue, as well as the language and design of the statute as a whole." Romine v. Diversified Collection Services, 155 F.3d 1142 (9th Cir. 1998). This Court has stated that the language of the FDCPA is the clearest expression of congressional will and should be the first point of reference in any action under the FDCPA. Heintz v. Jenkins, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995) (effect must be given to the plain meaning of the statute). A review of the aforementioned specific sections, and the "plain meaning" derived therefrom, indicates that the essential elements to a violation under these sections specifically, and the FDCPA generally, is that the complained of activity must be conducted by (a) debt collector and (b) in connection with the collection of consumer debt.

This Court in Heintz relied upon Black's Law Dictionary to define the scope of activities encompassed by the FDCPA – "To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings." Heintz, 514 U.S. at 294 (quoting Black's Law Dictionary 263 (6th ed. 1990)). Certainly, the sale of an account by a debt collector to another debt collector, where the consumer is not involved, is not the payment or liquidation of a debt encompassed by the FDCPA as interpreted by this Court in Heintz.

Accordingly, to establish a claim under any of the aforementioned sections, a prima facie element is that the complained of activity must be taken by a debt

collector *in connection with* the collection of a debt *from a consumer*. It is not sufficient to merely allege that a person or entity is generally a debt collector. If the conduct complained of is not in connection with collection of the debt in question, the FDCPA is not implicated and a consumer cannot, as a matter of law, bring an action against the alleged debt collector. Although Petitioner may be, in general, a debt collector, it was not, as a matter of law, a debt collector in selling the accounts to The Credit Store. Moreover, Petitioner's act of selling Respondent's accounts to The Credit Store was not, as a matter of law, in connection with the collection of a debt. Therefore Petitioner's conduct could not be the subject of a FDCPA action filed by the Petitioner, a consumer.

As a matter of law, and based upon the allegations pled in the Amended Complaint, Petitioner was not acting as a "debt collector" "in connection with" the collection of a consumer debt when it sold a portfolio of accounts, including Respondent's accounts, to The Credit Store. Respondent did not allege, and could not allege, that Petitioner took any of the typical actions that debt collectors take in connection with the collection of a debt. Respondent did not allege, and could not allege, that Petitioner engaged in any direct, or indirect, interactions with Respondent in an attempt to collect any debt from Respondent. As was mentioned above, Petitioner had no relationship or contact with Respondent after the sale, did not attempt to collect any money from Respondent, did not ask or instruct Respondent to contact it, and did not conduct any follow-up collection services. The sale of the accounts terminated any possibility of Petitioner collecting the debt from the Respondent and is not an act encompassed by the FDCPA.

In this case, Petitioner merely sold Respondent's accounts to The Credit Store, an act which cannot, as a matter of law, be in connection with the collection of a debt. At that time, Petitioner's actions to collect the debts entirely ceased. In turn, The Credit Store may have interacted with the Respondent and, therefore, may have engaged in activity that falls within the scope of the FDCPA. However, The Credit Store's actions cannot give rise to a claim of liability against Petitioner, which had stopped all interaction with the consumer upon its sale of the accounts to The Credit Store.

This is a case of first impression for the Court. Other than the lower courts in this proceeding, only one other court has resolved the question whether the sale of an account constitutes an attempt to collect a debt. In Neff v. Capital Acquisitions, 2002 U.S. Dist LEXIS 22642 (N.D.Ill. 2002),[1] a customer claimed that after he paid his delinquent credit card debt, as payment in full, to the first company, that company sold the outstanding account to a second company. Id. at *2. The second company then attempted to collect the balance due on the account. Id. at *3. Neff's complaint alleged that as a result of first company's sale of the account to second company, he was subjected to further collection activity and harassment when the debt should have been properly reflected as satisfied. Id. at *4. Neff asserted a claim against the seller of the account as a result of this conduct.

The district court found that there is a significant difference between the first company retaining ownership of Neff's debt but hiring a collection agency to work under its control, and selling the account to a third party. Id. at *20. The district court concluded that

[1] This case is currently on appeal to the Seventh Circuit.

the first company was no longer trying to collect Neff's debt for itself. Rather it simply sold an asset, an account receivable, at a discount. Id. at *21. Thus, the district court dismissed Neff's FDCPA cause of action for failure to state a claim upon which relief may be granted. Id.

Similar to this case, but not directly on point, the plaintiff in Laubach v. Arrow Service Bureau Inc., 987 F.Supp. 625 (N.D.Ill. 1997) argued that the defendant printing company was a "debt collector" merely because the defendant printing company received compensation to print and mail a large volume of "dun letters" that were created by a debt collector. In finding that the defendant printing company is not a debt collector as a result of its actions, the Court stated:

> [I]t is clear that [the printing company] is not a "debt collector" within the meaning of the FDCPA. First, the plaintiffs admit that [the printing company] does not collect money from the debtors. Indeed, in the letters, debtors are never asked or instructed to contact [the printing company], and [the printing company] does not include its return address or phone number in the collection letters it prints. The plaintiffs also agree that [the printing company] does not provide follow-up collection services, such as calling the debtors. [The printing company's] fees are not contingent upon the amount of money its clients actually collect; rather, [the printing company] charges its clients on a per-copy basis. Very significantly, the plaintiffs admit that [the printing company] has no relationship with the debtors' creditors.

Laubach, supra, 987 F. Supp. at 631. See also Lockemy v. Comprehensive Collection Services, Inc., 1998 WL 832655 (N.D.Ill.1998) ("the activities of [the defendant] were not the type that the FDCPA was designed to prevent" because the "[defendant] never directly contacts debtors to confirm addresses or phone numbers."). Accordingly, based upon the plain meaning of the FDCPA, Neff, Laubach and Lockemy, Petitioner's mere selling of Respondent's accounts to The Credit Store, in and of itself, is not an act to collect a debt encompassed by the FDCPA.

B. THE PETITION SHOULD BE GRANTED AS SIGNIFICANT PUBLIC POLICY ARGUMENTS DICTATE THE REVERSAL OF THE DECISION OF THE COURT OF APPEALS

The question presented in this case is significant to both consumers and the debt collection industry. It is estimated that there were five sellers of delinquent debt in 1992. By 1998, the number had grown to 225, and it is projected that there will be 300 major sellers of delinquent debt by 2005. The sellers of delinquent debt, include but are not limited to, American Express, Bank of America, Chase Manhattan Bank, First USA, Fleet Bank, GE Capital, and First Select. The face value of all such debt sold in 1993 was $1.3 billion. By 1997, that number had grown to $15 billion and sales reached approximately $25 billion in 2000. The Debt Buyers Association estimates that the amount of debt to be sold in 2001 will exceed that in 2000. Comments of the Debt Buyers Association, available at <http://www.ftc.gov/privacy/glbact/safeguard/dba.html> (Last visited March 8, 2003).

There also has been a major growth spurt among debt resellers - those companies that buy debts from

creditors and then place the portfolios back on the market after collecting on the accounts for a period of time. For example, between May 1, 2000 and June 30, 2000, 56 resale portfolios came to market with a face value of $65.2 billion. Resellers are finding an increasing role in the marketplace because collection law firms and collection agencies are receiving fewer placements from Special Report: A Debt Market in Transition, August 2000, available at <http.//creditors. www.collectionsworld.com/aug_art2.html> (Last visited March 10, 2003).

The debt sellers/resellers industry will be disrupted if, as the Ninth Circuit ruled, a legitimate cause of action exists with the mere unsubstantiated allegation that a debt collector has made false representations to an account purchaser about the legal status of a debt in connection with the sale, transfer or assignment of a debt to another debt collector, with the knowledge that the purchaser, transferee or assignee intends to initiate or continue attempts to collect the debt. A LEXIS search of all cases mentioning "FDCPA" within the past five years reveals there were 879 such cases. This number would multiply exponentially if the sale/resale of a debt constitutes an attempt to collect a debt encompassed by the FDCPA given the number of debt sellers and the high volume of debt sales. The judicial system will become bogged down with these cases, thereby diminishing courts' abilities to hear other cases in a timely fashion.

The standard announced by the Ninth Circuit in the Decision is overly broad and not based upon any specific facts – every consumer whose debt has been sold will be entitled to allege that the seller engaged in an act prohibited by the FDCPA even when the seller no longer interacts with the account debtor and the

account buyer engages in activity which may, or may not, violate the FDCPA.

Based on substantive case law, the clear and unambiguous language contained in the applicable provisions of the FDCPA and the public policy arguments outlined above, the Court should grant Petitioner's Writ of Certiorari to resolve this important legal issue.

CONCLUSION

The Decision of the Ninth Circuit expands the scope of activity to be regulated by the FDCPA beyond that intended by Congress and as previously interpreted by this Court. THEREFORE, Petitioner Unifund CCR Partners, Inc. requests of this Court that it GRANT its petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED,

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No. 01-15011

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK MAGRIN,
Plaintiff-Appellant,

v.

UNIFUND CCR PARTNERS, INC.,
Defendant-Appellee.

December 5, 2002, Argued and Submitted, San Francisco, California

December 10, 2002, Filed

COUNSEL:

For FRANK MAGRIN, Plaintiff-Appellant: Mitchell D. Gliner, Esq., Las Vegas, NV.

For FRANK MAGRIN, Plaintiff-Appellant: Richard J. Rubin, Esq., Santa Fe, NM.

For UNIFUND CCR PARTNERS, INC., Defendant-Appellee: G. Mark Albright, Esq., William H. Stoddard, Esq., ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, Las Vegas, NV.

For UNIFUND CCR PARTNERS, INC., Defendant-Appellee: William B. Fecher, Esq., STATMAN HARRIS SIEGEL & EYRICH, Cincinnati, OH.

JUDGES:

Before: RYMER, THOMAS and SILVERMAN, Circuit Judges.

OPINION:

MEMORANDUM *

Before: RYMER, THOMAS and SILVERMAN, Circuit Judges.

Frank Magrin appeals the district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) of his Fair Debt Collection Procedures Act, *15 U.S.C. § 1692 et seq.*, ("the Act"), claim. We reverse and remand. Because the parties are familiar with the factual and procedural history of this case, we need not recount it here.

We review a district court's dismissal of an action for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) *de novo*. See, e.g., *Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1035 (9th Cir. 2002)*. We likewise review *de novo* interpretation and construction of statutes. See, e.g., *Sea-Land Serv., Inc. v. Lozen Int'l LLC, 285 F.3d 808, 813 (9th Cir. 2002)*.

I

Congress designed and enacted the Act in part to "eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts [] the consumer has already paid." See S. Rep. No. 382, 95th Cong. 2d Sess. 4, reprinted in 1977 U.S. Code Cong. & Admin. News 1695, 1699; see also *Baker v. G.C. Servs. Corp., 677 F.2d 775, 777 (9th Cir. 1982)* ("The Act is designed to protect consumers who have been victimized by unscrupulous debt collectors, regardless of whether a valid debt actually exists.").

The district court in this case dismissed Magrin's amended complaint for failure to state a claim upon which relief could be granted against Unifund CCR Partners, Inc. because the sale of accounts by Unifund to the co-defendant The Credit Store, as alleged by Magrin, did not constitute a violation of the Act.

Under *15 U.S.C. § 1692e*, a debt collector violates the Act if it uses "any false, deceptive, or misleading representation or means in connection with the collection of any debt." This prohibition includes false representations as to "the character, amount, or legal status of any debt." *15 U.S.C. § 1692e*(2)(A). Thus, a consumer states a valid claim for relief under the Act when he alleges that a debt collector has made false representations as to the legal status of a debt in connection with the sale, transfer or assignment of a debt to another debt collector, with the knowledge that the purchaser, transferee or assignee intends to initiate or continue attempts to collect the debt.

To the extent that Magrin alleged this potential cause of action in the complaint, the district court erred in concluding that the amended complaint failed to state a claim upon which relief could be granted. However, the amended complaint is far from pellucid as to the specifics of its theory, even when the attachments to the amended complaint are considered.

We acknowledge the familiar rule that "[a] complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Van Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002)* (citations omitted). We also recognize that, in considering a Rule 12(b)(6) motion to dismiss a complaint, a court must consider all allegations of material fact as true and construe them in the light most favorable to the non-moving party. *Galbraith v. County*

of Santa Clara, 307 F.3d 1119, 1121 (9th Cir. 2002) (citation omitted). And to be sure, "if a complaint is accompanied by attached documents, the court is not limited by the allegations contained in the complaint." *Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).*

Magrin argues that, if we apply these maxims to our examination of his complaint, he has stated a claim for relief under the Act. From our examination of the district court order, we cannot determine with certainty whether it was founded on a belief that the Act did not embrace the theory that we have described, or that plaintiff's amended complaint failed to allege the theory. Rather than speculate, it is more appropriate for us simply to identify the applicable law, vacate the order and remand this case for reconsideration by the district court and for further proceedings in light of our decision.

The parties shall bear their own costs on appeal.

VACATED AND REMANDED.

----------Footnotes----------

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

No. 00-795

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

FRANK MAGRIN,
Plaintiff,

v.

THE CREDIT STORE, a foreign corporation, formerly CREDIT SOTRE, INC., (THE) , and UNIFUND CCR PARTNERS, INC.,
Defendants.

December 11, 2000, Filed

Before the Court for consideration is the Motion to Dismiss on behalf of Defendant Unifund CCR Partners, Inc.'s (#5), filed September 6, 2000. Plaintiff filed an Opposition to Defendant's Motion (#10) on October 25, 2000, to which Defendant Unifund Replied (#11) on November 6, 2000. Having read and considered the foregoing, the Court finds that Defendant Unifund CCR Partners, Inc.'s Motion to Dismiss must be granted.

Specifically, the Court finds that accepting as true the allegations set forth in Plaintiff's Amended Complaint (#3), filed August 17, 2000, Plaintiff Magrin fails to state a claim against Defendant Unifund CCR Partners, Inc. Fed. R. Civ. P. 12(b)(6).

The sale of accounts by Defendant Unifund to Co-Defendant The Credit Store alleged in Plaintiff Complaint does not constitute a violation of the Fair Debt Collection Practices Act. Additionally, the mailing of letters by Co-Defendant The Credit Store to Plaintiff does not constitute conduct giving rise to liability on the

part of Defendant Unifund for Plaintiff's state law claim of Invasion of Privacy.

IT IS THEREFORE ORDERED that Defendant Unifund CCR Partners, Inc.'s Motion to Dismiss (#5) is granted.

DATED: December 11, 2000

PHILIP M. PRO
United States District Judge